

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Docket No. C2013-10

RESPONSE OF AMERICAN POSTAL WORKERS UNION, AFL-CIO
TO USPS MOTION TO DISMISS
(October 2, 2013)

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Introduction

In this opposition, we generally decline to respond to the florid and provocative prose in the Postal Service's Motion to Dismiss. We pause at this point, however, to observe that the Postal Service's bombastic rhetoric seems to us to be a desperate effort to prevent the Commission from seeing the facts as they are. We are, proudly, a union. We also are a large mailer, as alleged in our complaint. Moreover, we know a lot about how and why the Postal Service is violating mandatory service standards as it handles our mail. If other mailers knew what we know, the Postal Service would face many more complaints before the Commission and before Congress.¹ This case provides the Commission an opportunity to make an important contribution to the debate about the Postal Service. We ask only that the Commission look at the facts and the law alleged in our complaint and reach the necessary conclusions. The Postal Service is failing to meet its service standards.

As the Postal Service noted, the Commission's rules on pleading require under 39 C.F.R. § 3030.10(a)(1) and (a)(2) that "A complaint must set forth the facts and circumstances that give rise to the complaint" and "clearly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements including citations to the relied upon sections of title 39, order, regulation, or other regulatory requirements."² The Postal

¹ The Postal Service asserts that the APWU is attempting to bring labor-relations concerns before the Commission. That is not the case. The APWU is a mailer that sends and receives mail across the country. What makes it distinct from other mailers is that it also has approximately 200,000 members working in postal facilities that are experts on postal operations. Because of its institutional knowledge, the APWU knows that the Postal Service is consistently not meeting the service standards it is required to meet. That knowledge led the APWU to file its complaint in the current matter.

² In dismissing complaints recently filed by the APWU locals, the Commission ruled that the complainants "failed to demonstrate any nexus" between the applicable laws and the complainants alleged claims. Order Dismissing Complaints, Dockets Nos. C2013-3 through C2013-9, at 10 (June 26, 2013).

Service points to the standards set forth by the Supreme Court in *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662(2009) as instructive in evaluating motions to dismiss. Motion to Dismiss, 10-11. The Postal Service does not point to any legal authority requiring the Commission to follow the federal courts' decisions on pleading standards. Nonetheless, should the Commission deem such decisions instructive, the APWU maintains that in Federal court, its complaint is sufficiently pled under those standards

To survive a motion to dismiss, a complaint must plead facts to support a plausible claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) quoting *Twombly*, 550 U.S. at 556. "On review of a motion to dismiss, [the Court] treat[s] the complaint's factual allegations as true ... and must grant [appellants] the benefit of all inferences that can be derived from the facts alleged." *In re Interbank Funding Corp. Sec. Litig.*, 629 F.3d 213, 216 (D.C. Cir. 2010) citing *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C.Cir.2003). The complaint must be construed "in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012) *cert. denied*, 133 S. Ct. 860 (U.S. 2013) *reh'g denied*, 133 S. Ct. 1489 (U.S. 2013) quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C.Cir.1979).

The Postal Service claims that the APWU lacks standing, fails to state a valid claim, and that its claim is not ripe and should therefore be dismissed. However, the APWU is an interested person with standing to file a complaint with the Postal Regulatory Commission, its claim meets the pleading standards established by the Supreme Court, and its claim is ripe for review, despite

the contentions of the Postal Service. The APWU's Complaint should therefore not be dismissed.

I. The APWU has Standing Because It is an Interested Person And the Alleged Facts Show Sufficient Injury

The Postal Service contends that the APWU does not have standing to pursue a claim against the Postal Service because it has not alleged any injury-in-fact. To the contrary, the APWU stated in its Complaint that "the APWU, its locals and the APWU Health Plan collectively mail millions of pieces of mail each year. The APWU sends First Class Mail and other classes of mail into, and receives mail from, rural and urban districts in every U.S. State and territory." Complaint ¶ 27. The Complaint further alleges that the Postal Service is violating service standards on a nationwide or substantially nationwide basis.

The Postal Service makes the argument that the APWU has failed to allege a sufficiently particularized injury it has suffered due to the Postal Service's inability to meet service standards. It would appear that the Postal Service is taking the position that the APWU must identify a specific mailing that fails to meet the delivery standards and causes an injury to the APWU. However, the APWU's Complaint makes clear that the APWU sends and receives mail to and from postal districts in every state and U.S. territory. The Complaint further identifies a number of different geographic areas in which mail consistently is not being delivered in accordance with law and regulations specifically cited in the Complaint. *E.g.*, Complaint ¶¶34- 35 ("As a result of recent network consolidations...mail processing has been moved from Brooklyn to the Morgan P&DC in Manhattan, New York. As a result of the change described in the paragraph above, a substantial percentage of First Class Mail is not receiving one-day delivery service within the SCF where it both originates and destines (intra-SCF mail). This is in violation of service standards."

The APWU has alleged that the Postal Service's service standards are being violated regularly in places where the APWU mails and where APWU locals mail on APWU business. Such an allegation is a sufficiently specific allegation that the APWU's mail is not getting the required service. Complaint ¶ 21.

The APWU has also alleged that the Postal Service's actions are not in compliance with §3661. Under this provision, the Postal Service is required to submit a proposal to the Commission whenever the Postal Service seeks to alter postal services on a nationwide or substantially nationwide basis. The Postal Service argues that the APWU does not have a valid claim under Section 3661 because the schedule for consolidating mail processing plants was not static and could be accelerated based on management's analysis of the implementation of the Network Rationalization Plan. According to the Postal Service, "the decision to accelerate was consistent with that analysis and because it was expected to have no effect on service standards, a new section 3661 case before acceleration was not necessary." Motion to Dismiss, 15. However, this rationalization falls apart when, as the APWU has alleged, the acceleration actually does have a negative effect on service standards. In addition to the allegations contained in the APWU's Complaint, about widespread reports of delayed mail (Complaint ¶¶30-61) a U.S. Senator has also noted the worsening service provided by the Postal Service to his rural constituency. At a hearing before the Senate Committee on Homeland Security and Government Affairs, Senator Tester (D-MT) informed the Postmaster General that he and his wife and their neighbors in rural Montana have experienced postal delays of four or five days. The hearing can be viewed at http://www.hsgac.senate.gov/hearings/outside-the-box-reforming-and-renewing-the-postal-service-part-i_maintaining-services-reducing-costs-and-increasing-revenue-through-innovation-and-modernization, and Senator Tester's statement begins at 1:13:20.

Additionally, the Postal Service claims that the Complaint is an attempt to “short-circuit” the Post-Implementation Review Process, which it claims will be used to “evaluate the network change and make any adjustments necessary to satisfy service standards.” Motion to Dismiss, 15. The description of the PIR Process in Handbook PO-408 makes no mention of making adjustments in order to satisfy service standards. The PIR is simply described as a process “to evaluate the effectiveness of consolidating mail processing operations.” This process should not be viewed by the Commission as a limitation on its jurisdiction over the Postal Service’s changes in service standards.

II. The APWU Has Specified The Applicable Regulatory Requirements the Postal Service Is Violating.

The Postal Service claims that the APWU’s complaint should be dismissed because it fails to identify citations to the relied upon section or sections of title 39, order, regulation, or other regulatory requirements. The Postal Service complains that it does not have a fair chance to respond to the allegations. To the contrary, the APWU’s complaint clearly states that the Postal Service issued a final rule revising service standards on May 25, 2012. This final rule amended 39 C.F.R. § 121.1, as the APWU’s Complaint makes clear. The final rule states that “until February 1, 2014, a 1-day(overnight) service standard is applied to intra-Sectional Center Facility (SCF) domestic First-Class Mail pieces properly accepted before the day-zero Critical Entry Times (CET).” First-Class Mail, Effective July 1, 2012. 77 Fed.Reg. No. 102, at 31190 (May 25, 2012). The APWU also cited the inter-SCF standard, which states that “Until February 1, 2014, a 2-day service standard is applied to inter-SCF domestic First-Class Mail pieces properly accepted before the day-zero CET if the drive time between the origin Processing & Distribution Center or Facility and the destination Area Distribution Center is 6 hours or less.”

Id. The APWU's complaint also alleges that mail at a wide variety of postal locations throughout the country is not being delivered according to this standard.

The Postal Service therefore errs in stating that the APWU has failed to identify and explain how the Postal Service had violated the applicable service standard. The Complaint spells out which standards are being violated and where. The standard is identified in the complaint and the complaint alleges that as a matter of fact, the standard is not being met. As the Commission considers the Motion to Dismiss, these facts alleged by the complainant are to be construed as true. Because the APWU has identified the service standards the Postal Service is violating and has supported this contention with factual statements demonstrating the Postal Service's failure to meet the service standards, the Postal Service has been given "a fair ability to respond to the allegations." Motion to Dismiss, 18.

III. The Complaint Is Ripe Because it Alleges Current Service Standard Violations

The APWU's complaint is ripe, contrary to the Postal Service's claims. In its motion to Dismiss, the Postal Service asserts that the APWU's claim is not ripe because "the implementation of the operational change that serves as the basis for the Complaint is not complete, and its effects on service standards cannot be determined until after implementation is complete." Motion to Dismiss, 20. The Postal Service seems to be asserting the implementation of the plan as a sort of affirmative defense to the allegations made by the APWU. However, the APWU is not complaining that the Postal Service has begun implementing its plan to close mail processing facilities. This Complaint is about the violation of service standards that has resulted from those closures. Furthermore, the Postal Service has cited no provision of law, no regulation and no legal principle that would excuse its failure to comply with the applicable service standard regulations. The Postal Service does not indicate when they would consider the

implementation to be “complete,” and thus ripe for judicial review. The APWU’s complaint is ripe because the Postal Service is required to meet service standards it is failing to meet.

Conceivably, the Postal Service would have the PRC wait until the entire network consolidation plan is in place before any interested party would be able to file a complaint. The Postal Service has not given any reason to think that the Postal Service’s delivery times will improve. Indeed, as more processing facilities are closed, it is quite possible that the delays will worsen.

The Postal Service also claims in support of its “ripeness” argument that litigating the claims at issue in the Complaint would be “a waste of Commission and party resources” because service issues can be addressed in the Annual Compliance Determination Process. Though it is true that the Postal Service’s performance is reviewed annually, the process is by no means the exclusive means for the Commission to monitor the Postal Service’s performance. If it were intended to be so, there would be no reason for the Commission to even allow for service complaints to be filed. Of course, Section 3662 of the Act and Commission regulations do permit such complaints to be filed and these types of complaints, including the APWU’s Complaint, may not be dismissed simply because the Postal Service’s Performance will eventually be reviewed in the Annual Compliance Determination.

Although the Annual Compliance Determination does allow for the Commission to review the Postal Service’s performance and determine whether the Postal Service was in compliance with service standards in effect during the previous year. 39 U.S.C.A. § 3653 (a)-(b). Furthermore, the Postal Service is not required to submit its 2013 report on its performance until the end of March 2014. 39 U.S.C.A. § 3652 (a). By that time, the service standards which

the APWU alleges are being violated will no longer be in effect, leaving the Commission without the ability to order the Postal Service to ensure they comply with the standards.

The Commission is obligated to exercise its jurisdiction over the Postal Service's failure to meet its service standards. The APWU has sufficiently pled that such violations are taking place in named locations around the country. The Commission must decide whether it will ignore the fact that these violations are taking place or allow the APWU's complaint to go forward.

IV. Claim Preclusion Does Not Apply Because The Complaint is Based on New Facts

The Postal Service errs when it contends that the APWU is precluded from bringing claims under 39 U.S.C. § 3661 and 39 U.S. § 3691(d). It is well settled that subsequent litigation is barred by claim preclusion "if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction. *Natural Res. Def. Council v. E.P.A.*, 513 F.3d 257, 260 (D.C. Cir. 2008) citing *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006). As the Postal Service admits, when determining whether a claim is precluded, a court should look at "the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies. *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984).

The Postal Service claims that this Complaint is barred under claim preclusion because of complaints previously filed by APWU locals and by the proceedings in Docket Nos. N2012-1 and C2012-2. Motion to Dismiss, 28. In its complaint in C2012-2, the APWU argued that the Postal Service violated Section 3661 of the Act by failing to request an advisory opinion from the Commission before implementing proposed changes to service standards. In Docket No.

N2012-1, the APWU was expressing its views on the network rationalization plan as part of the Commission Advisory Opinion process before it was implemented. Neither of those matters involved allegations that the Postal Service was then in violation of its service standards, much less did they involve any contention that the Postal Service would be violating its standards now. The Postal Service states that “the APWU and its associated groups have been party to multiple suits that discussed the merits of the new service standards, and alleged the same facts and legal issues.” Motion to Dismiss, 28. This is untrue. Many of the previous matters the Postal Service is referencing were filed by APWU locals, without the input of the APWU. Furthermore, while the APWU participated in the N2012-1 case, that matter was about the Network Rationalization Plan itself. The Complaint that the APWU now brings is focused on the current effects of that Plan and of the Postal Service departure from that Plan, a distinct legal issue based on distinct, recent facts. The allegations that the APWU is making here all current events that occurred in 2013 and are ongoing. It is impossible for the APWU to have already litigated the issue of whether the Postal Service began violating its service standards in the last few months.

Conclusion

For the foregoing reasons, the APWU respectfully requests that the Commission deny the Postal Service’s Motion to Dismiss.

Respectfully submitted,

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